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April 25, 1998

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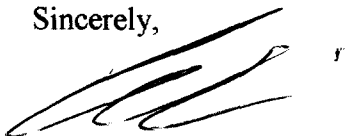
Office of the Secretary  
Federal Communications Commission  
Room 222  
1919 M Street NW  
Washington, DC 20554

Dear Sirs:

Please accept the enclosed as formal comments in the matter of RM-9242, with regards to low-power FM stations. An original and nine copies are enclosed. If there is any difficulty with regards to the form of this filing, (it is my first effort at filing formal comments with the Commission) please accept it as an informal comment.

Thank you.

Sincerely,



Alan H. Kline

049  
MMB

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## **I. Introduction and summary**

1. While there are issues raised in this Petition that warrant further study by the Commission, I believe that this proposal is so seriously flawed, for a variety of reasons, that I respectfully urge the Commission to dismiss the Petition without further action. It is evident to me, from reading and re-reading the Petition, that the true goals of the Petitioner are: To seek retaliation against "evil, corporate broadcasters" for developing digital television and allegedly squeezing some LPTV stations off the air; to craft LPFM rules in such a way where he is exempt from some of the restrictions proposed for other persons; and particularly, to legitimize illegal, "pirate" radio stations. None of these issues are in the public interest, and none justify the creation of a new class of broadcast station. Finally, the Petitioner fails to meet his burden, as required by the Commission's rules, to prove that the changes requested are sufficiently in the public interest. The Petition presents no data, research, or other evidence to demonstrate that there is a compelling public interest in an LPFM service, as proposed here, or that such a service would be economically viable. It is not enough for a group of individuals to wish to broadcast; it is also necessary to demonstrate that there is a substantial portion of the public who wishes to listen.

## **II. Background**

2. I have worked in the broadcasting industry, at non-commercial educational FM and commercial TV stations, for slightly more than twenty years. I earned a Bachelor of Arts degree in Communication and Theater Arts from the University of Iowa. It is worth noting that while at Iowa, several of my courses, particularly in the field of broadcast regulation, were taught by Dr. Robert Pepper, then the chair of the UI's Division of Broadcasting and Film, and now of course, the Chief of the Commission's Office of Plans and Policy. While I was a student I also served as a member of a student commission that was responsible for

converting KRUI (FM) Iowa City from carrier-current to fully licensed, NCE-FM status. I am also licensed by the Commission as an Advanced Class amateur operator, holding the callsign KN6HA. I am presently employed, and have been for the past eight years, as a technician on the operations staff of a San Francisco commercial television station. As I wish to make clear that these comments are totally my own, and in no way those of my employer, I have chosen not to name my employer in this filing. Aside from the employee/employer relationship I have with the station where I work, I have no financial interest in any broadcast property or other media entity, and I have no interest in placing a station of the type described in the instant Petition on the air. Because I am currently employed in television rather than radio, it is unlikely that my personal financial interest would be affected by a decision either for or against the Petition.

### **III. Discussion**

#### **A. The Petition fails to demonstrate a compelling public need for LPFM, as proposed.**

3. I believe that the Petitioner has failed to demonstrate any compelling reason for amending the Commission's rules in the manner that he proposes. Aside from quoting the Commission's Web page, which refers to 13,000 annual inquiries from persons expressing interest in building LPFM stations, he presents no data to support his claims. There is no evidence in the record demonstrating that all of the inquiries made of the Commission are from individuals who are seriously interested in constructing a station—it is likely that many of the inquiries are of a more casual nature. There is no evidence whatever to demonstrate that there is significant interest on the part of the public to *listen to* such stations. The burden here is on the Petitioner to demonstrate the need for the service, and I believe that he has failed to do so. Living in the San Francisco Bay area, an area of great cultural and ethnic diversity, and presumably an area where an LPFM service as described in the Petition might be useful, I have heard no great

outpouring of support for such a service. The local media, both broadcast and print, tend to portray current "pirate" operators as a curiosity, and not as providers of a significant public service. An accurate portrayal, in my opinion.

## **B. Constitutional Issues and the Communications Act**

4. The Petitioner immediately stretches his credibility here by citing the *Dunifer* case as a precedent in this matter. As the Commission is well aware, *Dunifer* is nowhere near the point in the judicial process where it could be used as precedent in any such matter—to the best of my knowledge, the only rulings to date from the District Court are on procedural matters, no decisions having yet been made on the substantive issues of the case. It likely will be a number of years, if at all, before the matter is decided by the Supreme Court. In the meantime, the precedents established by the Court in *National Broadcasting Co. v FCC*, 319 US 190, and *Red Lion*, 395 US 367, are still the precedent here, not *Dunifer*. *There is no constitutional right to a broadcast license*. For the Petitioner to imply otherwise, based on *Dunifer*, is at best, misleading. I also find it interesting that while the Petitioner cites the Commission's figure of 13,000 on its web page, he fails to mention the precedents of *NBC* and *Red Lion*, *contained on the same web page*. It could be argued that this is an effort to avoid reality.
5. However, since the Petition does invoke the Constitutional question, there is one other point worth making in that regard: In paragraph 48, the Petitioner asserts that some interference to other stations is acceptable in order to make LPFM stations possible. In my view, this is a rather arrogant assertion that the so-called rights of an LPFM operator are superior to those of either the established station or those who would choose to listen to it—not an atypical attitude from those who have an interest in legitimizing "pirate" radio. However, as the Supreme Court stated in *Red Lion*, the constitutional right to freedom of speech *also includes the right to listen*.

Simply put, each citizen has the right to choose to listen to any radio station he desires (or to choose any other form of media). For the Petitioner to assert that interference to other stations is acceptable is to imply that the rights of the listener are of no regard. Further, the Commission's rules on allocations, spacing, and so on have always been with the intent of minimizing any possibility of interference between stations. There is no compelling reason to modify those rules in a "patchwork" manner. While a case can be made that the FM Table of Allocations should be reviewed with a goal of increasing the number of stations that may be accommodated, given the state of current receiver technology, this is obviously a subject that would require a great deal of study and engineering research, as well as formal rulemaking by the Commission, and is not something that should be done with undue haste.

6. By placing his faith in *Dunifer*, the Petitioner shows that his heart is with the pirate operators. Based on statements made on the Internet by several such operators, there is no guarantee that true diversity of voices would be achieved by legitimizing their operations. One, when it is suggested that LPFM stations make an effort to provide a balanced view of community issues, spouts off that no "jack-booted Nazi FCC thug" will tell him how to program "his" station. Another, when asked if his station will allow community members to broadcast, states that persons wishing to produce a program must have "something substantial" to say. Presumably, the station operator is the sole arbiter of what constitutes "substantial". These are people who broadcast for their own ego gratification, and not with the public interest in mind.
7. The Petitioner claims, in paragraph 16, that the current system of broadcast regulation and ownership is contrary to the Constitution and is akin to Radio Moscow. Not only could this not be further from the truth, I find it to be patently offensive. Again, the Petitioner cites *Dunifer*, and again in so doing diminishes what is left of his credibility. I would reiterate my belief that

freedom of speech *is absolutely not imperiled* by the present system. With today's technology, there is a myriad of means available for anyone to express himself. The Internet has offered means for expression not even dreamt of just a few years ago, for one. Even the act of filing the Petition, and these comments, are entirely acceptable means of expression. There are many ways for a citizen to express him/herself with today's technology. The fact that not all individuals are deemed qualified to hold a broadcast license does not preclude that expression using other means. The Constitution guarantees each citizen the right to free expression. It does not require that government provide any particular means to transmit that expression, nor does it require that any other person *listen* to that expression. It most certainly does not require that one person's expression be granted at the expense of preventing the free expression of another.

8. In the following paragraphs, the Petitioner claims that the Commission has a responsibility, under section 307(b) of the Communications Act, to establish an LPFM service. This claim is based on a rather tortured rendering of the term, "community", and one that I do not believe can be supported by the legislative history of the Act. Rather, it is the kind of tired, strained logic typical of those who are trying to rationalize the pirate radio "movement". I believe that it is clear, from the history of the Act and its many decades of interpretation that "community" has always been taken to mean a geographic location, not some abstract grouping of humanity.

**C. Diversity of ownership is not guaranteed by the proposal.**

9. The Petitioner asserts that the interests of promoting diversity of ownership would be furthered by the creation of an LPFM service. This is one of his most fundamental arguments in favor of creating an LPFM service. However, he presents no data or other research to sustain that assertion, and fails to name any organization or other entity, representing the interests of

potential minority owners, that would support this claim. Rather, he retreats to the last resort of some rather glorious flag-waving, patriotic rhetoric about the grand and wonderful things that would happen with LPFM—again, with no evidence on the record to support this assertion, or to support changes in the Commission's rules. In fact, the Petition circumvents the diversity goals by requesting special preference for LPTV operators. The Petitioner has offered no evidence to show that the LPFM preference would promote diversity of ownership. All it would do is create an unjustified preference for a group who, he claims, are disenfranchised by the large, corporate interests who forced the Commission to adopt DTV. Another unsupported assertion, as I discuss later.

10. There are also, I believe, dangers in asserting that LPFM is the only way, or the most reasonable way, to promote diversity of ownership. To state that the cost of broadcast ownership must be reduced drastically to promote this goal is to do a disservice to the many owners of minority backgrounds, past and present, who achieved the goal within the current system. It implies that it is not possible for members of minority groups to achieve the goal in any other way. This simply is not accurate. It also implies that people of non-minority backgrounds would not need such assistance to be able to attain ownership. Both of these implications are dangerously close to racism, in my view. A better alternative, I believe, would be to establish programs providing low-interest loans or other means of assisting potential licensees to obtain the financial backing to purchase or establish a conventional radio station. Such, however, is well beyond the scope of this proceeding and may well be an area that would require action by Congress. Another potential landmine would be the likelihood that, once LPFM stations were on the air, there would be demands and petitions to allow these new stations to increase their power, claiming discrimination and First Amendment violations (again), if such were to be denied. This would wreak havoc, both on the air, and in the Commission and the courts. The interest of the public



would not, in any way, be served by such havoc. There must be a better way to achieve the diversity goals of the Commission and the Act. Creating a new class of stations, severely handicapped from the outset, does nothing to truly further those goals.

**D The Commission is correct in adopting the SBA's definition of "small business".**

11. I also disagree with the Petitioner's claim that the Commission erred in adopting the SBA's definition of "small business". It is entirely logical for the Commission to accept the judgment of another Federal agency in its area of expertise. It is also entirely *illogical* to expect each agency to craft its own definition of terms such as this—the result would be close to chaotic, and contradict the goals of the current Administration to "streamline" the operations of government. Whether or not the Petitioner agrees with the current definition is irrelevant.

**E. Spectrum efficiency**

12. In its Memorandum Opinion and Order in the *Dunifer* case, the Commission has well stated its reasoning for declining to authorize an LPFM service. I fully concur with the rationale presented there. Of particular interest is the following:

18. In addition to general concerns about spectrum efficiency, there is the matter of preclusion. Under this principle, the presence of one station at a particular site prohibits the establishment of other stations on the same or adjacent channels in that general area in order to avoid destructive interference. A simple example shows how preclusion and service are related. A 10 watt station with a 100 meter antenna has a service radius of 5.9 kilometers and a service area of 109 square kilometers. To protect this hypothetical low power station from interference by a co-channel Class A FM station operating at 6 kilowatts,<sup>1</sup> we would need to preclude the establishment of that Class A station within a distance of 92.6 kilometers from the transmitter for the

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<sup>1</sup> A Class A station may be authorized on any of the 100 FM channels (20 non-commercial and 80 commercial). A Class A station must operate with a minimum effective radiated power (ERP) of 100 watts up to a maximum ERP of 6,000 watts. At 6,000 watts and an antenna height of 100 meters the station has a protected service radius of 28 kilometers. See Sections 73.210 and 73.211 of the Commission's Rules, 47 C.F.R. §§ 73.210, 73.211.

low power station.<sup>2</sup> In contrast, one Class A station would preclude another co-channel Class A station within a distance of 115 kilometers. A Class A station, however, operating at 6 kilowatts with a 100 meter antenna has a service radius of 28.3 kilometers and a service area of 2,516 square kilometers. Therefore, while the preclusive effect of a Class A station is 24 percent greater than the 10 watt station (115 kilometers divided by 92.6 kilometers), the service radius of a Class A station is almost 500% greater than the smaller station (28.3 kilometers divided by 5.9 kilometers). Although the preclusive effect of a station increases with power, as we would expect, the service radius (and area) increases at a much faster rate. If we treat preclusion as a cost and service as a benefit, the cost/benefit ratio improves with power, but the ratio is very poor for low powered stations.

The Petitioner has failed to present significant evidence that there are grounds for reversing that decision.

**F. "Event stations" are an unnecessary headache.**

13. As to the proposal for "event", or temporary, LPFM stations, I would only point out that this Commission's predecessor, the Federal Radio Commission, ruled in 1928 that such stations were an administrative headache, not worth the effort, and declined to continue to authorize such stations. It should be noted that the FRC's responsibilities, and therefore burdens, were several orders of magnitude less than that of the present Commission. There has been nothing presented in this Petition to support the claim that there is any need whatever for such stations, or that the existence of such stations would not pose unacceptable interference to broadcast or other radio facilities. I believe that this is nothing more than an effort to legitimize "pirate" operations under another guise. I believe it is likely that "special events" would be concocted by pirate operators for the sole purpose of obtaining such a license, and once issued, an unscrupulous operator would continue using the event callsign indefinitely. Such stations—"moving targets", as it were, would more than likely prove to be a nightmare for the

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<sup>2</sup> These figures are derived from calculations using the engineering charts and technical regulations in Part 73, Subpart B, of the Commission's Rules. 47 C. F. R. Part 73.

Commission to track and enforce. There has been nothing presented here that would prove that a public benefit would ensue from "event" stations.

**G. Contrary to the Petition, LPTV as a class is not being forced out of business, and the Petition does not demonstrate sufficient reasons for granting special consideration to LPTV licensees.**

14. The Petitioner claims, in requesting special privilege for the owners of existing LPTV stations, that his life's savings, invested in his LPTV facility, will be rendered worthless by DTV, and therefore he and others similarly situated should be compensated by preference in the granting of LPFM facilities. This is a rather weak argument on several grounds. First, while it certainly may be true that in many markets, it will be more difficult to find acceptable channels for LPTV over the next few years, there is nothing in the Commission's rules that preclude the continued operation of LPTV stations. To the contrary, the Commission has been expending a great deal of effort to assist LPTV licensees in the process of moving to available channels. The Commission's Mass Media Bureau has recently granted affected LPTV operators more time to prepare the necessary applications, in view of the fact that there are not enough qualified consultants available to assist. For the Petitioner to assert that LPTV stations, as a group, are being forced off the air by the DTV conversion is, in my view, untrue, and not worthy of consideration as a factor in any new LPFM service.
15. Some in the industry see a future for LPTV. The April 6 issue of *Electronic Media* reports the story of T. Frank Smith, Jr., the (soon to be retired) owner of KRIS-TV, Corpus Christi, TX. In addition to the full-power KRIS-TV, Mr. Smith recently purchased six LPTV stations, and constructed a new tower facility that provides for digital antennas for his full-power *and* LPTV facilities. Obviously, Mr. Smith sees the future possibilities for LPTV, as do the incoming

owners of his stations. It should also be noted that, of those LPTV stations, one was a Fox affiliate and another an affiliate of Telemundo. This would seem to contradict the Petitioner's assertion here that LPTV stations are the guardians of localism and therefore deserving of special consideration. It also contradicts his claim that his property would be rendered worthless by DTV. One would expect that someone who presents himself as a broadcast consultant would go to greater efforts to find a new channel for operation, if necessary, to protect his own investment. The conversion to digital television is certainly no secret, and the Petitioner has had more than sufficient advance notice to either adjust his operations or dispose of them in a manner that would provide at least some return on his investment. There is no public interest to be served by having the Commission reward the Petitioner's lack of business foresight with a preferred assignment in another service. It also would establish a dangerous precedent, in that any person displaced from any secondary service under the Commission's jurisdiction would have the right to demand compensation for that displacement. LPTV is, after all, a secondary service, and presumably, the Petitioner understood that at the time he applied for a license. It's a little too late in the game to cry foul. Finally it should be pointed out that there is resale value in the equipment of a television station which could be realized, and in any event, it certainly is not possible to transfer all of the equipment of a television station to radio. It is much more than simply operating the same equipment on a different frequency and with a different mode of emission. Some new equipment would need to be purchased in any event, and because of this, LPTV preferences for LPFM would be more of a gift than compensation. Again, there is simply no public interest to be served here. Also with regards to the claim for LPTV priority in the granting of LPFM assignments: It would give greater credence to the Petitioner's effort to draw parallels between the two services if he had offered a description of his programming and the manner of the local service he offers to his community—if any. The Petitioner has not placed any evidence on the record to show that he has previously offered the

kind of local, community-oriented service proposed here, or that LPTV operators, as a group, have provided sufficient service of this type to warrant a blanket exemption from the proposed lottery procedures.

**H. The Petition does not guarantee locally-originated LPFM programming and does not provide economic data to justify an LPFM service.**

16. It is also worth noting here that while the Petitioner trumpets the localism ideals of his LPFM proposal, *the proposal imposes no requirement that a LPFM station devote any time whatever to local issues*. It is entirely within possibility that a LPFM station could simply plug into a syndicated program service, or for that matter, simply program a “CD jukebox”, for its entire broadcast day, from its very first day. The Petition offers no economic data to demonstrate that LPFM stations, as proposed, with an extremely limited listening radius, could attract and hold sufficient revenue to produce an ongoing, predominantly local program service—one that would attract and retain an audience. It is not possible to provide a public service if no one is listening, and there has been nothing presented here to show that LPFM programming would differ substantially from existing services.

**I. LPFM will not create good, well-paying jobs.**

17. It is no secret within the industry that many jobs in existing radio stations, with larger revenue streams than can be achieved by stations such as are proposed here, offer pay scales roughly comparable to local fast-food restaurants. There is no evidence here to suggest that LPFM stations, with limited revenue potential, could offer anything better. There is also no evidence to sustain the position that LPFM would be a windfall to equipment manufacturers. To the contrary, most manufacturers of RF-related equipment, particularly tower manufacturers and erectors, will prosper very nicely within the next few years due to the DTV conversion. The

problem for most manufacturers will not be to generate sales, but to make the stuff fast enough. LPFM is small potatoes in comparison.

#### **J. Ownership considerations**

18. The proposal that an LPFM operator may only own one station within a market, in my view, is nothing more than an attempt to strike back at what the Petitioner believes to be the "evil corporate interests". It appears to be nothing more than an effort to seek some form of retribution against the full-power television industry for its alleged effort to "force" the Commission to adopt its rules and allocations for digital television. The two issues bear no relationship to one another at all. The justification seems to be that no station owned by a corporate entity is capable of providing effective, local service to the community in which it operates. Such an assertion is an insult to the many thousands of people in the radio and television industries who make a sincere and dedicated effort to ascertain and serve the needs of their communities. While it is true that in many cases, stations operate with a minimum of community oriented programming, it is equally true that there are many stations that devote substantial time and resources to this effort. To name one or two examples would only serve to ignore the service of many others. The Petitioner's blanket assertion in this regard is entirely unjustified. Moreover, as I have stated above, there is no protection to the public offered in the Petition to guarantee that LPFM stations would be more than mere "CD jukeboxes", and there is no evidence in the Petition that would suggest that LPFM stations owned by corporations could not serve their communities well. One must also consider that "public service" takes many forms. To many members of the public, broadcasts of the local major- or minor-league, college, or even high school sports team is as compelling, and as much in their interest, as a learned discussion of matters of political concern. Each has equal merit, and each must be considered when "public service" is considered as a whole.

19. Limiting the number of stations that any single entity may own could also serve to prevent the establishment of any LPFM service in areas of hilly terrain, where several such transmitters may be required to provide adequate coverage, or in areas of sparse population, where several transmitters may be required to provide an audience of sufficient size to generate the necessary revenue. This Petition offers no proof that ownership restrictions, such as those proposed here, would offer any assurance of "community oriented" service. As such, it protects a small group of individuals at the possible expense of the public interest in general.

#### IV Conclusions

20. I believe it is appropriate to conclude these comments by noting the problems with each of the Petitioners conclusions:

- A. **Make more efficient use of the FM band without interference.** Disproved, I believe, by the Commission's rationale in the *Dunifer* MO&O, particularly the section I've quoted.
- B. **Increase diversity of ownership of stations including "minority ownership".** LPFM is no guarantee of diversity and in fact, the Petition tries to circumvent that goal by crafting exceptions for existing LPTV operators, who may or may not fall within the "minority" category.
- C. **Give the listening public more and better listening choices.** There is no guarantee of any of this, and certainly no guarantee that LPFM stations, as proposed, would be able to generate programming of sufficient quality to attract and hold an audience.
- D. **Provide for affordable radio advertising to small businesses...** Again, no data to support this conclusion, and no data to support the implication that stations would be constructed in areas where small businesses are supposedly underserved.
- E. **Create new jobs...** A total fallacy.

**F. Help to level the playing field...** There are other ways to promote diversity of ownership, in a manner that gives the new owners a fighting chance to compete in today's broadcast industry.

LPFM, as proposed here, is not an acceptable solution.

**G. Create a large number of locally owned radio stations that, on the whole, will be more responsive to the needs and issues of the local communities.** There is nothing in this proposal that would provide assurance that LPFM stations would devote significant resources to community issues; and further, there is no evidence that existing stations, as a whole, cannot or will not provide equal or better service.

21. This Petition is an answer in search of a question. While there may be a need for "community oriented" stations, and I certainly do not oppose the creation of such a service, this Petition is not the appropriate vehicle for creating that service. This proposal would create a class of stations that would be so handicapped, from the beginning, that they could not reach a level of economic viability that would support this service. There is no need for the Commission to rush into a proceeding to reshape the broadcast band, and while there are issues that may warrant further study, I believe that the appropriate method would be for the Commission to issue a Notice of Inquiry into the matters of redrafting the existing FM Table of Allocations, and the matter of providing quality, economically-viable, community radio. There is no urgency in this regard, except perhaps in the eyes of the Petitioner and some of his allies—in fact, it would seem that the Petitioner's goal is to railroad this matter through the Commission to suit his own interests, and the interests of illegal, "pirate" operators, before all of the consequences can be understood.

22. The Commission's overriding mandate is, first and foremost, to promote and protect the interests of the *entire American public*, not just a relatively small group of individuals, as this



petition does. There are other ways to promote the goals of diversity of ownership, in a far more effective manner, than that proposed here. This is a badly reasoned proposal, requesting that the Commission act with undue haste in a matter which could affect the entire FM broadcast band, and I respectfully request that the Commission reject this Petition without further action.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'AK', written over a horizontal line.

Alan H. Kline

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Daly City, CA 94015

April 25, 1998